Mr. Justice Gaston

SUPREME COURT OF THE UNITED STATES.

No. ~~215.~~ 133.

WATTS SHERMAN, PL'FF IN ER.,

vs.

JAMES M. SMITH, RECEIVER OF OLIVER LEE AND COMPANY'S BANK AT BUFFALO.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

GEO. S. GIDEON, printer, 511 Ninth street, Washington, D. C.

See 1 Black
Decisions on
Charter Power of
Banking Bank
&c &c

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Gideon, print.

In the Court of Appeals of the State of New York.

To the Honorable Benjamin F. Greene, one of the justices of the Supreme Court of the State of New York:

The petition of Henry B. Gibson, of Canandaigua, in the county of Ontario and State of New York, respectfully shows that your petitioner is a stockholder of Oliver Lee and Company's Bank at Buffalo, which is a body corporate and politic, organized, existing, and doing business as such at the city of Buffalo, in the county of Erie and State of New York, under and by virtue of an act of the people of the State of New York, represented in senate and assembly, entitled "An act to authorize the business of banking," passed on the eighteenth day of April, in the year one thousand eight hundred and thirty-eight and of the acts supplementary thereto and amendatory thereof; that the said corporation was organized as aforesaid during the month of January, in the year one thousand eight hundred and forty-four, and has ever since been engaged in the business of banking, at the city of Buffalo aforesaid, until and including the third day of September, in the year one thousand eight hundred and fifty-seven, when it suspended its business, and has not resumed the same since.

That the capital stock of the said corporation is one hundred and seventy thousand dollars, one hundred and thousand dollars of which have been paid in.

That your petitioner is the owner and holder, in his own right, of twenty thousand dollars of the capital stock of the said corporation, and has paid the same in, in full.

That the said corporation has, ever since its organization, issued bank notes, intended to be circulated as money, and the same have been so circulated.

That on the fourth day of September, in the year one thousand eight hundred and fifty-seven, the said corporation became, and was unable to meet its liabilities, and by reason to continue its business, and did on that day suspend its business, and has not since resumed the same, nor paid its said notes, or the checks of its customers or depositors, nor its drafts, as he is informed and verily believes, and that its chief shareholders have determined that it is impracticable for the said corporation to attempt to resume its said business.

That your petitioner has examined statements furnished by the officers of the said corporation, showing the amount of its indebtedness, and the character, extent, and condition of its assets; that such indebtedness is very large, and its assets to a very great extent are unavailable, a considerable portion thereof being past due and in suit.

That your petitioner, from such examination, believes that the said corporation is insolvent, and if not insolvent, he verily believes it is in imminent danger of insolvency.

Wherefore your petitioner prays for an order declaring the said corporation insolvent or in imminent danger of insolvency, and that a receiver with the usual powers may be appointed to wind up the affairs of the said corporation, or for such other, or further, or different order, or relief in the premises, as your honor may see fit to grant.

Dated Buffalo, September 12th, 1857.

HENRY B. GIBSON.

JOHN GANSON, *Attorney for Petitioner.*

STATE OF NEW YORK,
Ontario County, ss.

Henry B. Gibson being duly sworn, deposes and says that the matter stated in the foregoing petition are true in substance and matter of fact.

HENRY B. GIBSON.

Subscribed and sworn to before me, this 12th day of September, A. D. 1857, at the village of Canandaigua, in said county.

C. YOUNGLOVE,
Justice of the Peace of said County.

STATE OF NEW YORK,
County of Ontario, ss.

I, John J. Lyon, clerk of the county court in and for the county and state above mentioned, do hereby certify that Cornelius Younglove, whose genuine signature appears above, is, and was at the time of signing the same, a justice of the peace in and for the county and State aforesaid, duly commissioned and sworn; that all his official acts as such are entitled to full faith and credit; and that the aforesaid county court is a court of record, having general jurisdiction.

Given under my hand and seal of office, at Canandaigua, this 12th day of Sept., 1857.

JOHN J. LYON, *Clerk.*

At the chambers of Benjamin F. Greene, September 12, 1857, in the city of Buffalo and State of New York:

IN THE MATTER OF THE APPLICATION of HENRY B. GIBSON, for an order declaring Oliver Lee and Company's Bank at Buffalo insolvent, or in imminent danger of insolvency.

On reading and filing the petition of Henry B. Gibson, bearing

date on the twelfth day of September, in the year one thousand eight hundred and fifty-seven, duly verified, praying for an order declaring Oliver Lee and Company's Bank at Buffalo insolvent or in imminent danger of insolvency, and it appearing that the said Oliver Lee and Company's Bank at Buffalo is a body corporate and politic, created, existing, and doing business as such, under and by virtue of an act of the people of the State of New York, represented in senate and assembly, passed on the eighteenth day of April, in the year one thousand eight hundred and thirty-eight, and of the acts passed supplementary thereto and amendatory thereof, and that it was so organized in the month of January, one thousand eight hundred and forty-four, and has been doing business under the acts aforesaid ever since at the city of Buffalo, in the State of New York, and that it has issued its notes to circulate, and has circulated the same as money, and done a general banking business since the month of January last aforesaid, to the fourth day of September, one thousand eight hundred and fifty-seven, when it suspended its said business from inability to longer continue the same; and it further appearing that the said corporation is now insolvent, or at least in imminent danger of insolvency: Now, therefore, on motion of John Ganson, of counsel for the said petitioner, it is hereby ordered that the 14th day of September instant, at nine o'clock in the forenoon of that day, be the time, and the old court-house in the city of Buffalo be the place, and the same are hereby appointed as the time and place for the hearing of the parties before me, as to whether the said Oliver Lee and Company's Bank at Buffalo is solvent, or otherwise, or in imminent danger of insolvency. It is hereby further ordered, that on the day and at the place so appointed for such hearing as aforesaid, the officers of the said corporation exhibit before me all of the books, papers, and accounts, assets and effects of said corporation, and that they then and there appear, that they may be examined under oath, touching the said application. It is hereby further ordered that a copy of this order be served upon the president or cashier of the said Oliver Lee and Company's Bank at Buffalo, by delivering it to either the said president or cashier this day, as notice of the hearing aforesaid, and that no other notice of such hearing need be given.

B. F. GREENE.

STATE OF NEW YORK,
Erie County, ss.

John Ganson, being duly sworn, deposes and says, that he served the within order, on the twelfth day of September, one thousand eight hundred and fifty-seven, upon Henry L. Lansing, as president of Oliver Lee and Company's Bank at Buffalo, by exhibiting to him the same, and by delivering to him at the same

time and leaving with him personally a copy of said order. That the said Henry L. Lansing is personally known to this deponent; that he is and was at the time of such service such president, and such service was made in the city of Buffalo, State of New York.

JOHN GANSON.

Subscribed and sworn to before me, at the city of Buffalo, on this 14th day of September, A. D. 1857.

B. F. GREENE.

IN THE MATTER OF THE APPLICATION of HENRY B. GIBSON, for an order declaring Oliver Lee & Co.'s Bank, at Buffalo, insolvent, &c.	At Chambers 12, 1857.

Ordered, That the said bank be, and hereby is, declared insolvent; that James M. Smith, of Buffalo, be appointed receiver of said bank, upon giving a bond in a penalty of $250,000, with three or more sureties, who will justify in the above amount in the aggregate.

B. F. GREENE.

IN THE MATTER OF THE APPLICATION of HENRY B. GIBSON, for an order declaring Oliver Lee & Company's Bank insolvent, or in imminent danger of insolvency, &c.

An application having been made to me the twelfth day of September, one thousand eight hundred and fifty-seven, by the above named Henry B. Gibson, for an order declaring the Oliver Lee and Company's Bank at Buffalo insolvent, or in imminent danger of insolvency, which application was founded upon the petition of the said Henry B. Gibson, duly verified by the affidavit of him, in and by which petition it was set forth and appeared that the said Oliver Lee and Company's Bank at Buffalo was at the time of making said application a banking corporation, organized, and doing business as such at the city of Buffalo, in the county of Erie and State of New York, under and by virtue of an act of the people of the State of New York, represented in senate and assembly, entitled "An act to authorize the business of banking," passed April eighteenth, in the year one thousand eight hundred and thirty-eight, and of the acts supplementary thereto and amendatory thereof, and that said corporation was organized as aforesaid during the month of January, in the year one thousand eight hundred and forty-four, and had ever since been engaged in the business of banking, at the city of Buffalo aforesaid, until the third

day of September, one thousand eight hundred and fifty-seven, when it suspended its business, and had not resumed the same since that period. That the capital stock of said corporation paid in at the time of making said application was one hundred and sixty thousand dollars, and that the entire capital of said corporation was at the time aforesaid one hundred and seventy thousand dollars, and that the said petitioner was the owner and holder in his own right of twenty thousand dollars of capital stock in said corporation, and has paid the same in, in full. That said corporation had ever since its organization issued bank notes, intended to be circulated as money, and the same had been circulated as money. That on the fourth day of September, in the year one thousand eight hundred and fifty-seven, the said corporation became and was unable to meet its liabilities, and by reason thereof to continue its business, and had not since that day resumed the same, nor paid its said notes or the checks of its customers or depositors, nor its drafts; and that the chief shareholders of said corporation, upon an examination of the affairs thereof, had determined that it was impracticable for the said corporation to attempt to resume its said business. That the indebtedness of said corporation, as appeared from an examination of statements furnished by the officers thereof, showing the amount of its indebtedness, and the character, extent, and condition of its assets, was very large, and its assets to a very great extent were unavailable, a considerable portion thereof being past due and in suit. That the said corporation, if not insolvent, was then in imminent danger of insolvency. And whereas, upon the application so as aforesaid made, I made an order appointing the old court-house in the city of Buffalo, and nine o'clock a. m. of the fourteenth day of September, A. D. 1857, time and place for the hearing of the said parties before me, as to whether the said Oliver Lee and Company's Bank at Buffalo is solvent, or otherwise, or in imminent danger of insolvency; and that on the day, and at the place so appointed for such hearing as aforesaid, the officers of the said corporation exhibit before me all of the books, papers, and accounts, assets and effects of the said corporation, and that they then and there appear, that they be examined under oath touching said application, and directing that a copy of said order be served upon the president or cashier of the said Oliver Lee and Company's Bank at Buffalo, by delivering it to either the said president or cashier, on said twelfth day of September aforesaid, as notice of the hearing aforesaid, and that no other notice of said hearing need be given. And the said parties having appeared before me, in pursuance of said order, at the time and place therein mentioned, to wit, at the old court-house in the city of Buffalo, at nine o'clock a. m. of said fourteenth day of September, the said petitioner appearing by John Ganson, his counsel, and the Oliver Lee and Company's Bank at Buffalo appearing by Henry L. Lan-

sing, president; and due proof having been made to me by affidavit of the personal service of a copy of said order on the said president, on the said twelfth day of September, 1857, by delivering the same to and leaving it with the said president personally at the city of Buffalo, and at the same time exhibiting to said president the original order so as aforesaid made, and having thereupon proceeded to said hearing, said parties then and there consenting thereto, and having heard the proofs and allegations of the said parties, and examined the president of the said corporation on oath in relation to its financial condition, and it appearing therefrom that the said Oliver Lee and Company's Bank at Buffalo is, and during the time aforesaid has been, such corporation as aforesaid; that the capital of said corporation paid in is one hundred and sixty thousand dollars, of which the said petitioner was the owner and holder of twenty thousand dollars; that said corporation did its business at the city of Buffalo aforesaid, and that it had during all the time in said petition set forth issued bank notes, circulating and intended to circulate as money; and that the said corporation was insolvent at the time of making said application to the entire amount of its capital and surplus, and about one hundred thousand dollars more. And whereas an order was made by me on said application, on the fourteenth day of September of 1857, declaring said Oliver Lee and Company's Bank at Buffalo insolvent, and that James Murdock Smith, of Buffalo, be appointed receiver thereof, upon giving a bond in a penalty of two hundred and fifty thousand dollars, with three or more sureties, who should justify in that amount in the aggregate; and whereas an application has been made to me on behalf of the above named petitioner for a modification of said last mentioned order in reference to the amount of the security which the said James M. Smith was thereby required to give; and it appearing to me that the said Smith has not hitherto entered upon the duties of such receivership:

Now, therefore, it is ordered, that the said James M. Smith be and he hereby is appointed receiver of the property of the said Oliver Lee and Company's Bank at Buffalo, upon his executing within ten days from the date hereof, a bond, with two or more sureties, to be approved by a justice of the supreme court, to the people of the State of New York, in the penalty of fifty thousand dollars, conditioned for the faithful performance of his duties as such receiver, and for the due accounting for all moneys received by him as such. And I further order that the said bond, and the petition and order hereinbefore mentioned, be filed in the office of the clerk of the county of Erie.

Dated Buffalo, February 25, 1858.

B. F. GREENE.

In pursuance of the foregoing order, James M. Smith, the receiver therein named, duly executed and filed with the clerk of

the county of Erie, a bond as therein directed, duly approved by the Hon. B. F. Greene, and thereupon entered upon the discharge of his duties as such receiver.

That afterwards, and on the 26th day of March, 1859, the said receiver made a report in compliance with the provisions of the statute in such case made and provided.

Supreme Court.

IN THE MATTER OF THE APPLICATION of HENRY B. GIBSON, for an order appointing a Receiver of Oliver Lee and Company's Bank at Buffalo.	At Chambers, March 26th, 1859.

Whereas on the twelfth day of September, 1857, an application was made to the undersigned, a justice of the supreme court of the State of New York, residing in the eighth judicial district, by Henry B. Gibson, he then being a stockholder, and owning stock to the amount of more than one-tenth part of the capital paid in, in Oliver Lee and Company's Bank at Buffalo, a banking corporation organized and doing business as such at the city of Buffalo, in the county of Erie and State of New York, under and by virtue of an act of the people of the State of New York, represented in senate and assembly, entitled "An act to authorize the business of banking," passed April 18th, in the year 1838, and of the acts supplementary thereto, and amendatory thereof, and had from and after the first day of January, 1850, until the third day of September, 1857, issued bank notes circulating and intended to circulate as money, for an order declaring the said corporation insolvent, or in imminent danger of insolvency; and whereas such proceeding were thereupon had, that thereafter, and on the 14th day of September, 1857, I did duly determine that the said corporation was at the time of making such application and then was insolvent, *an* did then and there make an order declaring such determination, and did appoint James M. Smith, of Buffalo, receiver of such bank, upon his giving bond in a penalty of two hundred and fifty thousand dollars, with three or more sureties, who should justify in the said amount in the aggregate; and whereas, afterwards, and on the twenty-fifth day of February, in the year 1858, I did, upon application made to me, modify the said order by appointing the said James M. Smith such receiver as aforesaid, upon his executing a bond, with two or more sufficient sureties, to be approved by a justice of the supreme court, to the people of the State of New York, in the penalty of fifty thousand dollars, conditioned for the faithful performance of his duties as such receiver, and for the due accounting for all moneys received by him as such receiver, and whereby I did further order that the said bond be

filed in the office of the clerk of the county of Erie; and whereas the said James M. Smith, thereafter, and on the third day of March, 1858, in accordance with the terms of said order, did execute a bond to the people of the State of New York, which was duly filed in office of the clerk of Erie county:

And whereas I did afterwards, and on the thirtieth day of June, upon the application of the said receiver, make an order that the said receiver have until the 30th day of September, 1858, in which to declare a dividend of the cash in his hands among the creditors of the said bank, and to do the other things required by him to be done; and whereas I did afterwards, and on the first day of October, duly make an order, upon the application of the said receiver, that he have until the first day of January, 1859, to declare a dividend, and to do the other things required by law to be done as aforesaid, and did also make a further order on the thirty-first day of December, 1858, granting a similar extension of time for making said dividend, and performing such other acts, until the first day of March, 1859; and whereas, on the first day of March last, aforesaid, the said receiver did make such dividend among the creditors of said corporation:

And whereas the said receiver has this day rendered to me in writing a particular account of the debts and liabilities of said corporation contracted after the first day of January, 1850, remaining unsatisfied, and a preliminary account of all proceedings under oath, in which the said receiver has set forth the amount of cash realized by him, the expenses and allowances claimed by him, the said receiver, all payments made by him, the amount on hand which remains to be divided, and the dividend so as aforesaid declared by him; and he having also at the same time reported and submitted to me a true and accurate list, and statement of the persons who, since the first day of January, 1850, have been stockholders of said corporation, the nominal amount of stock held by each, and the residence of each stockholder, so far as the same can be ascertained, which said list and statement is made up from the stock books, ledger, and list of stockholders kept by said corporation, and which said list and statement also show when each stockholder acquired and transferred the stock standing in his name, as by the said account list and statement will more fully appear:

Now, on motion of John Ganson, attorney for the said receiver, I hereby order, in pursuance of the statute in such case made and provided, that the said report and list of stockholders be referred to the Honorable Nathan K. Hall, of the said city of Buffalo, who is hereby appointed a referee for such purpose, who shall, after giving notice to all persons concerned, apportion the debts and liabilities of said corporation which have been contracted after the first day of January, 1850, and remain unsatisfied, among the said stockholders ratably in proportion to their stock, according

to the principles declared in an act of the legislature of the State of New York, entitled "An act to enforce the responsibility of stockholders in certain banking corporations and associations, as prescribed by the constitution, and to provide for the prompt payments of demands against such corporations and associations," passed April fifth, in the year 1849, and that the said referee report his proceedings to me, or to some other justice of the supreme court residing in the said eighth judicial district, according to law, and that the said report be filed, and this order entered in the office of the clerk of the county of Erie.

B. F. GREENE.

Supreme Court.

In the matter of the Application of Henry B. Gibson for an order appointing a Receiver of Oliver Lee and Company's Bank, at Buffalo.	Referee's Report.

To the Justices of the Supreme Court of the State of New York, and to each of them:

In pursuance of an order made by the Honorable Benjamin F. Greene, one of the justices of the said supreme court, residing in the eighth judicial district, bearing date the 26th day of March, 1859, by which the report of James M. Smith, esq., the receiver of Oliver Lee & Company's Bank, at Buffalo, and a list of the stockholders therein made and reported to said justice by said receiver, were referred to the undersigned as referee, with directions, after giving notice to all persons concerned, to apportion the debts and liabilities of such corporation contracted after the first day of January, 1850, and remaining unsatisfied, among the stockholders in the said corporation ratably in proportion to the amount of stock held by them, according to the principles declared in the act of the legislature of the State of New York, entitled "An act to enforce the liability of stockholders in certain banking corporations and associations, as prescribed by the constitution, and to provide for the prompt payment of demands against such corporations and associations," passed April 5, 1849, and by which said order the undersigned, as such referee, was further directed to report his proceedings to the said justice of the supreme court, orto some other justice of the supreme court residing in the eighth judicial district, according to law, I, Nathan K. Hall, the referee named in the said order, do respectfully report:

That the said order of reference was delivered to me for execution on the 28th day of March, 1859, and that I did thereupon designate and appoint the 26th day of April, 1859, at 10 o'clock in the forenoon, and at my office in the city of Buffalo and county

of Erie, as the time and place of hearing the matters so referred; and that, pursuant to the directions in said order contained, I caused due notice of my appointment as such referee, and that I would proceed to a hearing of the matters so referred, on the said 26th day of April then next, at ten o'clock in the forenoon of that day, at my office in the city of Buffalo, and also that I would then and there proceed to hear the allegations and proofs of all persons and parties interested in the matters referred, and would ascertain the persons who were chargeable as stockholders for the debts and liabilities contracted by said bank, and the amount chargeable to each, according to the rules and principles declared in the act hereinbefore referred to, to be given to Erastus Corning, Israel T. Hatch, Henry B. Gibson, Watts Sherman, Alexander Duncan, William Butler Duncan, Charles H. Dobney, David Duncan, Henry L. Lansing, E. Selden Thayer, Erastus Corning, jr., and Frances H. Low, (who appeared by such report and list to be stockholders as aforesaid,) and to all other persons in any wise concerned, by causing a notice thereof to be published in the Albany Atlas and Argus, the Albany Evening Journal, the Buffalo Commercial Advertiser and the Buffalo Courier, (the newspapers designated in an order made for that purpose by the Honorable Richard P. Marvin, one of the justices of the supreme court of the State of New York, residing in the eighth judicial district,) for the period and in the manner in the said order and the said statute directed, affidavits of which publication of the said notice are hereto annexed, and to which I respectfully refer. And I further certify and report that I also caused said notice to be served on such of the said stockholders as appeared by the said list so reported by the said referee to be residents of the county of Erie, in the manner particularly mentioned in the affidavits and testimony of John Ganson and James Tucker, hereto annexed, and which show personal and other proper service of such notice, and to such affidavits and testimony I respectfully refer as part of this my report.

And I further certify and report that in pursuance of the said order of reference, and of the said notice, I did, at the time and place so mentioned in the said notice, proceed in the said reference and upon the matters so referred, and that thereafter, by adjournment from day to day and from time to time, I proceeded upon the said matter so referred until the 31st day of May, 1859, when the proofs upon the said reference were declared to be closed, and I proceeded to prepare my apportionment and report.

And I further certify and report that at the several times when proceedings have been so, as aforesaid, had before me under the said order of reference, I have heard the allegations and proofs offered and made by the parties interested in the said matters so referred, and have proceeded to take proofs in regard to the debts and liabilities of the said bank, and as to ascertain who are charge-

able as stockholders for the debts and liabilities of the said bank, contracted as aforesaid, and remaining unsatisfied, and the amount chargeable to each according to the rules and principles declared in the said act of the legislature of the State of New York, hereinbefore referred to.

And I do further certify and report that it was satisfactorily proved before me, that the debts and liabilities of the said bank were correctly stated and set forth in the schedule annexed to the said receiver's report so referred to me as aforesaid, and amounted to the sum of $502,944 22, besides interest accrued thereon. And also, that the cash and assets in the hands of the receiver, together with an assessment and collection of the sum of $170,000, and interest from the stockholders, would not, under any circumstances, produce a sufficient sum to pay off and discharge the debts and liabilities of the said bank, by reason whereof I determined to apportion to such stockholders, respectively, an amount equal to the amount of stock held by them respectively in the said Oliver Lee and Company's Bank, at Buffalo.

And I do further certify and report that it was also satisfactorily proved before me, upon the said reference, that schedule H, annexed to the said receiver's report so referred to me, as aforesaid, states truly the names of the stockholders of the said Oliver Lee and Company's Bank, at Buffalo, the nominal amount of the stock held by each, and the residence of each, and the dates when each stockholder acquired and transferred such stock as therein stated, with the exception that in respect to one hundred shares of stock standing in the name of said Henry B. Gibson on the books and stock ledger of said bank, and in said schedule, it appeared that at the time of the suspension of the said bank, and for several years prior thereto, the said Henry B. Gibson appeared upon the books and stock ledger of the said bank as a stockholder thereof, holding three hundred shares of its stock, but that one hundred shares of such stock equitably and in fact belonged to the said Henry L. Lansing, at and before the time of the suspension of the said bank; that the said Lansing, at and before the time of such suspension, held the certificate or scrip of said stock, with a power of attorney for the transfer thereof on the books of the bank, and was then entitled to a transfer of said one hundred shares, and that he had previously received the dividends thereon.

And I further certify and report that upon the proofs before me, I have assessed the said Henry B. Gibson and the said Henry L. Lansing, jointly, as being both liable as stockholders on account of the said one hundred shares of stock.

And I further certify and report that after hearing and duly considering the proofs and allegations made before me upon the said reference, I did find and determine, and do accordingly adjudge and report that the default in the payment of any of the debts of

the said bank was first made in or about the first week in September, 1857, and not before that time, and that all the debts and liabilities of the said bank now remaining unsatisfied were contracted after the first day of January, 1854, and at different times after that day.

And I do hereby, in pursuance of the said order of reference so made by the Hon. Benjamin F. Greene, as such justice as aforesaid, and by virtue of the power and authority vested in me as such referee, by the said order and the act of the legislature of the State of New York, hereinbefore referred to, find, decide, adjudge, and report, that the several persons whose names are embraced in the list of "stockholders upon whom the debts and liabilities of Oliver Lee and Company's Bank, at Buffalo, are apportioned," contained in schedule "A A" hereto annexed, and forming part of this, my report, and to which I respectfully refer, are the stockholders of the said Oliver Lee & Company's Bank, at Buffalo, who are responsible individually, equally and ratably, and jointly, or separately and severally as therein stated, for the debts and liabilities of the said bank, reported to be due by the receiver thereof, to the amount set opposite to their respective names in said schedule; that the number and amount of the shares of the said stock of the said Oliver Lee and Company's Bank, at Buffalo, held by them respectively, on which they are respectively responsible as aforesaid, are stated and set forth in said schedule "A A" hereto annexed opposite the names of such persons respectively, and that the stockholders so named in said schedule "A A" are respectively liable and responsible severally or jointly as therein stated, to pay the several sums set forth in the last column of said schedule "A A" opposite to their names respectively, which sums I have apportioned, and do hereby apportion, in pursuance of the said act of the legislature of the State of New York, and of the said order of reference, to and among the said stockholders, as therein stated, as their ratable proportion of the debts and liabilities of the said Oliver Lee and Company's Bank, at Buffalo, contracted after the first day of January, 1850, and remaining unsatisfied. according to the principles declared in the said act of the legislature of the State of New York.

And I do further certify and report, that I have annexed hereto the engrossed minutes of the testimony taken by me on such reference, and of the proceedings thereon, together with the exhibits made and marked in the course of such proceedings and testimony, with the exception of the stock ledger of said bank, (which, after being given in evidence and marked and examined by me, was retained in the custody and under control of the re-

ceiver of said bank,) and I hereby respectfully refer to such minutes and exhibits as forming part of this, my report.

Buffalo, June 6, 1829.

All which is respectfully submitted.

N. K. HALL,
Referee.

Schedule "A A" referred to in the preceding report and forming part thereof.

A list of the stockholders of Oliver Lee and Company's Bank, at Buffalo, who were responsible for the debts and liabilities of the said bank, with the number and amount of the shares of said stock held by them respectively, and on which they are respectively liable, together with the amount of such debts and liabilities for which are respectively liable, as apportioned by N. K. Hall, referee.

Names of the several stockholders upon whom the debts and liabilities of Oliver Lee and Company's Bank, at Buffalo, are apportioned.	Number of shares of stock held by such stockholders respectively.	Amount of stock held by such stockholders respectively, or on which they are liable to be assessed.	Amount apportioned to and against such stockholders respectively.
Erastus Corning	600	$60,000	$60,000
Israel T. Hatch	80	8,000	8,000
Henry B. Gibson	200	20,000	20,000
Henry B. Gibson and Henry L. Lansing, jointly	100	10,000	10,000
Watts Sherman	70	7,000	7,000
Alexander Duncan, Watts Sherman, William Butler Duncan, Charles H. Dabney, and David Duncan, composing the firm of Duncan & Sherman & Co., jointly	500	50,000	50,000
Henry L. Lansing	50	5,000	5,000
E. Selden Thayer	50	5,000	5,000
Erastus Corning, jr.	50	5,000	5,000
	1,700	$170,000	$170,000

Buffalo, 6th June, 1859.

N. K. HALL,
Referee.

At a special term of the supreme court, held at the court-house, in the city of Buffalo, in and for the county of Erie, on the twenty-fourth day of June, in the year one thousand eight hundred and fifty-nine. Present, Hon. Noah Davis, jr., justice.

IN THE MATTER OF THE APPLICATION of HENRY B. GIBSON, for an order appointing a Receiver of Oliver Lee and Company's Bank, at Buffalo.

The Honorable Nathan K. Hall, to whom it was referred by an order made by Benjamin F. Greene, one of the justices of the supreme court, residing in the eighth judicial district, bearing date the twenty-sixth day of March, one thousand eight hundred and fifty-nine, to apportion the debts and liabilities of the said Oliver Lee and Company's Bank, at Buffalo, which had been contracted after the first day of January, one thousand eight hundred and fifty, and were then remaining unsatisfied among the stockholders of the said corporation, ratably in proportion to their stock, according to the principles declared in an act of the legislature of the State of New York, entitled "An act to enforce the responsibility of stockholders in certain banking corporations and associations, as prescribed by the constitution, and to provide for the prompt payments of demands against such corporations and associations," passed April fifth, in the year one thousand eight hundred and forty-nine, and that said referee report his proceedings thereon according to law, having made his report bearing date the sixth day of June, one thousand eight hundred and fifty-nine, wherein and whereby it appears, that he has apportioned the debts and liabilities of the said Oliver Lee and Company's Bank, at Buffalo, contracted after the first day of January, one thousand eight hundred and fifty, and remaining unsatisfied, (which debts and liabilities amounted to the sum of five hundred and two thousand nine hundred and forty-four dollars twenty-two cents, exclusive of interest which had accrued thereon,) among the following named persons, and in the amounts set opposite their names respectively, as and for the ratable portion of them and each of them, of the debts and liabilities aforesaid.

Names.	Amounts.
Erastus Corning	$60,000 00
Israel T. Hatch	8,000 00
Henry B. Gibson	20,000 00
Henry B. Gibson and Henry Lansing, jointly	10,000 00
Watts Sherman	7,000 00
Alexander Duncan, Watts Sherman, William Butler Duncan, Charles H. Dabney, and David Duncan,	

(composing the firm of Duncan, Sherman & Co.,) jointly	$50,000 00
Henry L. Lansing	5,000 00
E. Selden Thayer	5,000 00
Erastus Corning, jr	5,000 00

And the said referee having reported that the persons above named are the stockholders of the said corporation, who are responsible individually, equally, and ratably, and jointly or separately and severally, as above stated, to the amounts set opposite their respective names aforesaid, which said amounts are respectively the amount of stock owned by each of the aforesaid stockholders in the said corporation; and the said referee having presented his said report to the present special term of this court, and a motion having been made on behalf of the receiver of the property of the said corporation, that the said report and apportionment be in all things ratified and confirmed:

Now, on hearing Mr. John Ganson, of counsel for said receiver, and Eli Cook for Duncan, Sherman & Co., and others, it is ordered that the said report and apportionment do stand in all things ratified and confirmed; and it is further ordered that the said report and apportionment, together with this order of confirmation of the same, be filed in the office of the clerk of the county of Erie.

NOAH DAVIS, JR.,
Justice Supreme Court.

Supreme Court.

IN THE MATTER OF THE APPLICATION of HENRY B. GIBSON for an order appointing a Receiver of Oliver Lee and Company's Bank, at Buffalo. } Case.

The reference so ordered as aforesaid came on to be heard before the Honorable Nathan K. Hall, referee, at his office in the city of Buffalo, on the twenty-eighth day of March, one thousand eight hundred and fifty-nine, and proceeded from time to time until the same was completed.

The said referee, upon the evidence given before him, upon such hearing, found the following facts:

That Oliver Lee and Company's Bank at Buffalo was an association formed on the twenty-third day of January, one thousand eight hundred and forty-four, under and in pursuance of the act of the legislature of the people of the State of New York, represented in senate and assembly, entitled "An act to authorize the business of banking," passed on the eighteenth day of April, in the year

one thousand eight hundred and thirty-eight, and the acts passed supplementary thereto and amendatory thereof.

That the following is a copy of the original articles of association duly executed and filed, namely:

Articles of association of "Oliver Lee and Company's Bank, at Buffalo," made and entered into under and in pursuance of an act of the legislature of the State of New York, entitled "An act to authorize the business of banking," passed April 18, 1838, and the acts amendatory thereof and in addition thereto.

These presents witness, that the subscribers, whose names are hereto affixed, have associated, and do hereby associate themselves, under and pursuant to the acts aforesaid, to establish an office of discount, deposit, and circulation, and to conduct the business of banking as thereby authorized, and do hereby certify and declare the articles of their association as follows:

First. The name used to distinguish this association, and to be used in its dealings, shall be "Oliver Lee and Company's Bank, at Buffalo."

Second. The operations of discount and deposit of the said association are to be carried on at the city of Buffalo, in said State.

Third. The capital stock of this association shall be one hundred thousand dollars, and be divided into one thousand shares of one hundred dollars each, which may be increased at any time, on the terms hereinafter mentioned, to one million of dollars.

Fourth. The associates hold and own the said capital stock of one hundred thousand dollars, and have contributed thereto in the proportions following:

Oliver Lee, of the city of Buffalo, four hundred shares, amounting, at one hundred dollars each, to.....	$40,000
Erastus Corning, of the city of Albany, three hundred shares, amounting, at one hundred dollars each, to.....	$30,000
Watts Sherman, of the city of Albany, three hundred shares, amounting, at one hundred dollars each, to...	$30,000

Fifth. The association shall commence on the first day of January, one thousand eight hundred and forty-four, and terminate on the first day of January, two thousand eight hundred and forty-four.

Sixth. The said Oliver Lee shall be, and he is hereby, constituted and chosen the president of this association, and shall so continue until another person shall be elected in his place. The president shall be the executive and financial officer of the association, until otherwise directed by the associates.

Seventh. The capital stock of the association may at any time, or from time to time, be increased to an amount not exceeding in the whole one million of dollars, in such manner and on such

terms as the associates may at any time hereafter, or at the time of such increase, prescribe and direct.

Eighth. No transfer of any part of the capital stock of the said association shall be made by any of the associates, unless by the consent in writing of all the other associates.

Ninth. The said associates shall meet from time to time, as often as may be necessary, for the transaction of the business of the association, and the direction and management of its affairs, and regular minutes shall be kept of the proceedings of such meetings; and in all such meetings, and in conducting the business of the said association under these articles, the said Oliver Lee shall be entitled to one vote, and the said Erastus Corning and Watts Sherman jointly to one vote. The associates may attend any meeting to be held as aforesaid by an attorney to be appointed for that purpose, who shall have the right to act and vote for his principal the same as if such principal were personally present.

Tenth. The associates may, at any time hereafter, provide for the election of a board of directors to manage the concerns of the association in such manner and with such authority and power as they may see fit.

Eleventh. The said association shall possess and enjoy all the rights, franchises, privileges, and powers, that any association formed or organized under the acts of the legislature aforesaid may or can possess, enjoy, or exercise, and the said associates, for themselves and their assigns, do hereby become and declare themselves contracting parties with the people of the State of New York, under the said acts of the legislature, and do accept the franchises and privileges therein and thereby offered and provided to and for any association which may be formed under the same.

Twelfth. The said associates shall, from time to time, appoint such officers and agents as they may deem necessary for the management of the business and concerns of the association, who may be removed at the pleasure of the associates.

Thirteenth. Dividends of the profits of the association shall be made from time to time as the associates may deem proper.

Fourteenth. The shareholders of this association shall not be liable in their individual capacity for any contract, debt, or engagement of the association.

Fifteenth. No associate shall, directly or indirectly, procure any loan or discount from the association, or in any way appropriate or use any part of its funds for his individual purposes without the consent of the other associates, and the stock of every associate shall be liable for any debt, demand, or liability the association may hold against him.

Sixteenth. The association may, from time to time, establish such by-laws as may be necessary for the proper management and direction of the affairs and business of the association.

Seventeenth. These articles of association may be changed, from time to time, with the assent in writing of two-thirds in interest of the association, provided that no change shall be made by which the rights, remedies, or security of its then existing creditors shall be weakened or impaired.

In witness whereof, the said parties have hereunto set their hands and seals, this first day of January, in the year one thousand eight hundred and forty-four.

OLIVER LEE, [L. S.]
ERASTUS CORNING, [L. S.]
WATTS SHERMAN. [L. S.]

Certificate.

We, the persons hereinafter named, and who have hereunto set our hands and seals, do hereby certify that we have this day associated to establish an office of discount, deposit and circulation, and to conduct the business of banking under and in pursuance of the act of the legislature of the State of New York, entitled "An act to authorize the business of banking," passed April 18, 1838, and the several acts amendatory thereof and in addition thereto, upon the terms and conditions, and subject to the liabilities prescribed in said act; and for ourselves and our assigns we do hereby become and declare ourselves contracting parties with the people of the State of New York, under the said acts of the legislature, and do accept the franchises and privileges therein and thereby offered and provided to and for any association which may be formed under the same.

And we do further certify, as follows:

1. The name used to distinguish the said association, and to be used in its dealings, is Oliver Lee & Company's Bank, at Buffalo.

2. The operations of discount and deposit of the said association are to be carried on at the city of Buffalo, in said State.

3. The capital stock of the said association is one hundred thousand dollars, divided into one thousand shares of one hundred dollars each.

4. The names and places of residence of the shareholders, and the number of shares held by each of them respectively, are as follows:

Oliver Lee, of the city of Buffalo, four hundred shares.
Erastus Corning, of the city of Albany, three hundred shares.
Watts Sherman, of the city of Albany, three hundred shares.

5. The said association shall commence on the first day of January, in the year one thousand eight hundred and forty-four, and terminate on the first day of January, in the year two thousand eight hundred and forty-four.

We have provided by our articles of association that the capital

stock aforesaid may, at any time, or from time to time, be increased to an amount not exceeding in the whole the sum of one million of dollars, and that the number of associates may also be increased frem time to time, on the terms and conditions mentioned in the said articles. The said articles also declare that the shareholders of the association shall not be liable, in their individual capacity, for any contract, debt, or engagement of the association.

In witness whereof we have hereunto set our hands and seals, this first day of January, in the year one thousand eight hundred and forty-four.

[L. S.]

OLIVER LEE,
ERASTUS CORNING,
WATTS SHERMAN.

Sealed and delivered in the presence of—
JOHN WILSON.

STATE OF NEW YORK,
City and County of Albany, ss.

On this twenty-third day of January, one thousand eight hundred and forty-four, before me personally appeared the above named Oliver Lee, Erastus Corning and Watts Sherman, to me known to be the persons described in and who executed the foregoing instrument, who acknowledged that they, and each of them, did execute and deliver the same for the uses and purposes therein mentioned. Therefore let it be recorded.

JOHN Q. WILSON,
Judge of Albany County Court, and Counsellor-at-law in the Supreme Court.

That the said association suspended business by reason of insolvency, on the fourth day of September, one thousand eight hundred and fifty-seven; that its debts and liabilities then exceeded the sum of five hundred thousand dollars, and that the cash and assets of the association in the hands of the receiver, together with an assessment and collection of the sum of one hundred and seventy thousand dollars and interest from the stockholders, would not, under any circumstances, produce a sufficient sum to pay off and discharge the debts and liabilities of the association.

That its capital stock was one hundred and seventy thousand dollars at the time of its suspension, and was then owned as follows, as appears by the stock ledger, namely:

Erastus Corning, of Albany	$60,000 00
Israel T. Hatch, of Buffalo	8,000 00
Henry B. Gibson, of Canandaigua	30,000 00
Watts Sherman, of New York	7,000 00
Duncan, Sherman & Co., of New York	50,000 00

Henry L. Lansing, of Buffalo	5,000 00
E. Selden Thayer, of Buffalo	5,000 00
Erastus Corning, jr., of Albany	5,000 00
	$170,000 00

That the shares of the stock are one hundred dollars each.

That the stock ledger, as above set forth, states truly the names of the stockholders of the said association, the nominal amount of the stock held by each, and the residence of each, with the exception of one hundred shares of stock, standing thereon, in the name of Henry B. Gibson. This one hundred shares, equitably and in fact, belonged to Henry L. Lansing, at and before the time the association suspended, but had never been transferred to him on the stock ledger, or transfer book.

That the first default in the payment of any of the debts of the said association, was, in the first week of September, one thousand eight hundred and fifty-seven, and not before that time, and that all of the debts remaining unsatisfied were contracted after the first of January, one thousand eight hundred and forty-four, and at different times after that day that it issued circulating notes until its suspension.

The counsel for Watts Sherman, and for Duncan, Sherman & Co. insisted in their behalf, respectively, that they were not liable personally, as stockholders or otherwise, for the debts and liabilities of the corporation, or any portion thereof, and that the same should not be apportioned or charged upon them respectively, either ratably or otherwise, and they submitted the following objections thereto:

I. That by the 14th clause of the articles of association, the contract under which they respectively became stockholders, it was expressly provided that "the shareholders of this association shall not be liable in their individual capacity for any contract, debt, or engagement of the association;" and that such contract was authorized and confirmed by the State as one of the contracting parties, by the general banking law of 1838, which provided, among other things, that "No shareholder of any such association shall be liable in his individual capacity for any contract, debt, or engagement of such association, unless the articles of association by him signed shall have declared that the shareholder shall be so liable;" and by which it was further provided, that every person becoming a shareholder by transfer, "shall, in proportion to his shares, succeed to all the rights," if prior shareholders. (Laws of 1838, chap. 260, §§ 23, 19.)

II. That the rights of the shareholders, thus secured by a contract authorized by law, are protected by the Federal Constitution

from encroachment by subsequent State laws, whether in the form of constitutional provisions or legislative enactments; and the rights and obligations of these parties are, therefore, in this respect, unchanged by the personal-liability clauses contained in the constitution of 1846, and in chapter 226 of the laws of 1849.

III. That the power to change, by subsequent legislation, the terms and obligations of antecedent contracts, is not reserved by the 32d section of the general banking act; and the reservation therein of power at any time to alter or repeal the law has full scope and effect, without construing it as authorizing the legislature to impair or annul contracts, lawfully made between the stockholders, prior to such alteration or repeal.

IV. That a reservation by the State, in express terms, of power to impair, by subsequent laws, the obligation of contracts between individual citizens, lawful at the time they were made, would be in conflict with the Federal Constitution, and no consent on the part of the corporation could make it effectual; and that, in regard to these stockholders, the attempt is to impose liability by expunging a clause lawfully inserted in the articles of association—a personal contract of the stockholders, as between themselves, distinct from the public certificate required by the act.

V. That the antecedent rights and obligations of the shareholders are not impaired or affected by the seventh section of the eighth article in the constitution of 1846, as the power to alter or repeal the act of 1838 was reserved to the legislature, and not to the people of the State, or a convention of their representatives.

VI. That the act of 1849, to enforce the responsibility of stockholders, was intended merely to regulate the mode of enforcing the liability against those on whom it was imposed by the constitution, and that it was not designed, and does not operate to subject to personal responsibility any except those made liable by the constitution.

VII. That even if the legislature had power to change the rights of the contracting parties, and to subject the shareholders to burdens from which they were exempted by their articles of association, still the act of 1849 does not accomplish that purpose, being itself in conflict with the State constitution in the following, among other particulars:

1. It provides that the liability of the stockholders shall be enforced only in the mode it prescribes; thus restricting the shareholders and the creditors alike to its anomalous and summary process of ascertaining and determining their respective rights.

2. The process to which the parties are thus limited is special and peculiar, and the rights of the stockholders, as well as of the corporation and its creditors, are to be decided and divested under its provisions, without the right of trial by jury, and without due process of law.

3. It prevents even the corporation from contesting the claim of the creditor who institutes the process, unless by permission of a judge out of court, to be obtained on affidavit, showing what the defence is; and the judge may withhold the right of defending, unless he is satisfied the defence is a good one.

4. The claims of creditors are to be ascertained extra judicially by the receiver, and the shareholders not only have no opportunity to contest them, but they are not, even by constructive notice, made parties to the proceedings, until the receiver has exhausted the assets by declaring dividends on such uncontested claims.

5. The stockholders have no opportunity of contesting their status as such, or the apportionment of the debts and liabilities in any suit between them and the creditors, and are deprived of the right of trial by jury in respect to any question on which their liability depends.

6. The act discriminates between different creditors, withholding from creditors, whose claims are less than one hundred dollars, the means of enforcing their constitutional rights, which are extended to other creditors.

7. It prevents creditors from enforcing their claims against shareholders to the full amount of their stock respectively, and makes them liable only equally and ratably.

8. It prevents any creditor from proceeding against the stockholders, or either of them, until he first exhausts his remedy against the bank, thus making the liability contingent and conditional.

9. The remedy tendered is not by action of any kind, and the proceeding is special and exceptional throughout, burdening the creditor with the expense, delay, and complication incident to a litigation with the bank, and all its debtors, its other creditors, and its stockholders, and involving their litigations among themselves respectively, with his own against them all.

The referee overruled each of the objections so taken as aforesaid separately.

The said counsel specifically excepted to each decision of the referee on each of the said objections so as aforesaid separately made.

The referee thereupon decided, as matter of law, that the shareholders, in whose behalf the objections aforesaid were taken, were respectively liable to apportionment to the extent of their ratable proportion of the liabilities of the said association, and embraced them in such apportionment accordingly.

To which several rulings and decisions respectively their counsel excepted separately and specifically.

The hearing upon the referee's report, in the above entitled matter, and the exceptions thereto afterwards, and on the twenty-fourth day of June, one thousand eight hundred and fifty-nine, at a special term of this court, came on to be heard before the honorable

Noah Davis, jr., one of the justices of this court, and upon such hearing the counsel for the said Watts Sherman, and for the said firm of Messrs. Duncan, Sherman and Company, again insisted in their behalf, as he insisted before the referee on the reference aforesaid, and raised and presented, separately and specifically, each of the objections and propositions which had been previously taken before the referee, and hereinbefore stated, and each of the same was separately overruled by the said justice; and to the decision on each of the same separately, and the final conclusion and decision of the court on the report, the said counsel specifically excepted.

CAGGER & HILL,
Attorneys for Watts Sherman and Duncan, Sherman & Co.

Supreme Court.

IN THE MATTER OF THE APPLICATION of HENRY B. GIBSON, for an order appointing a Receiver of Oliver Lee and Company's Bank, at Buffalo.

SIR: Take notice that Watts Sherman and Alexander Duncan, Watts Sherman, William Butler Duncan, Charles H. Dabney, and David Duncan, composing the firm of Duncan, Sherman & Co., hereby appeal to the general term of this court, from the order confirming the report and apportionment made by the referee in this proceeding, and from the judgment entered thereon in the office of the clerk of Erie county, on the 29th day of June, 1859.

Dated July 26th, 1859.

Yours, &c.,
CAGGER & HILL,
Attorneys for defendants, Watts Sherman and Alexander Duncan; Watts Sherman, William Butler Duncan, Charles H. Dabney, and David Duncan, comprising the firm of Duncan, Sherman & Co.

To JOHN GANSON, Esq., *Attorney, &c.*, and OBADIAH J. GREEN, *Clerk of County of Erie.*

At a general term of the supreme court held at the court-house in the village of Lockport, in the county of Niagara, in and for the eighth judicial district, on the sixteenth day of September, one thousand eight hundred and fifty-nine.

Present, Hon. Benjamin F. Greene, P. justice; Noah Davis, jr., Richard P. Marvin, justices.

IN THE MATTER OF THE APPLICATION of HENRY B. GIBSON, for an order appointing a Receiver of Oliver Lee and Company's Bank, at Buffalo.

The appeal to the general term of this court from the order of the special term confirming the report of the referee, and his apportionment of the debts and liabilities of the Oliver Lee and Company's Bank at Buffalo, among the stockholders thereof, taken on the part of Watts Sherman and Alexander Duncan, Watts Sherman, William Butler Duncan, Charles H. Dabney and David Duncan, having been brought on for argument at the present term of this court, after hearing Mr. John K. Porter for the said appellants, and Mr. John Ganson for the receiver—

It is ordered, that the said report and apportionment of the referee in this matter, and the judgments entered in pursuance thereof, be in all things ratified and confirmed with the costs of this appeal, and that this order be entered and filed in Erie county clerk's office, and the judgment of affirmance be there entered, with the costs of appeal to be adjusted.

At a general term of the supreme court held at the court-house, in the village of Lockport, Niagara county, in and for the eighth judicial district, on the seventeenth day of September, one thousand eight hundred and fifty-nine: present, Hon. B. F. Green, presiding judge; Noah Davis, jr., Richard P. Marvin, justices.

IN THE MATTER OF THE APPLICATION of HENRY B. GIBSON, for an order appointing a Receiver of Oliver Lee and Company's Bank at Buffalo.

The appeal taken to the general term of this court on the part of Watts Sherman and Alexander Duncan, Watts Sherman, William Butler Duncan, Charles H. Dabney and David Duncan, from the order of the special term, confirming the report of the referee and his apportionment of the debts and liabilities of Oliver Lee and Company's Bank at Buffalo, among the stockholders thereof, having been argued at the present term of this court, by Mr. John K. Porter for said appellants, and by Mr. John Ganson for the receiver, and the court having, after deliberation thereupon, ordered that said report and apportionment, and the judgment entered in pursuance thereof, be in all things ratified and confirmed with costs, and said costs having been adjusted at the sum of forty-seven dollars and seventy-two cents:

Now, on motion of John Ganson, attorney for the receiver of said bank, it is ordered, that the judgment and order of the special term, confirming the report of the referee in this matter and his

apportionment of the debts and liabilities of said corporation and the judgment entered and docketed in pursuance of the said order, be and the same hereby is in all things ratified and confirmed; and it is further ordered, that the receiver of said corporation recover of the said appellants the said sum of forty-seven dollars and seventy-two cents, the costs of this appeal so adjusted as aforesaid, and that he have execution therefor.

Judgment signed September 20th, 1859.

O. J. GREEN, *Clerk.*

STATE OF NEW YORK,
Erie County Clerk's Office, ss.

I, Obadiah J. Green, clerk of the county of Erie and of the courts of record thereof, do hereby certify that I have compared the foregoing copy of the report of the receiver of the property of Oliver Lee and Company's Bank at Buffalo; the order referring the same to the referee; the report of the said referee; the order of the special term confirming the report and apportionment of said referee; and the case made and filed by Watts Sherman, and by Duncan, Sherman & Co; the notice of appeal to the general term therefrom; and the judgment of the general term affirming the same, with an original report of the receiver's order of reference; report of referee; order of special term; notice of appeal and judgment of general term respectively, and notice of appeal to the court of appeals now remaining on file in the clerk's office of Erie county; and that the foregoing are true copies of said originals and of the whole and every part thereof.

In witness whereof I have hereunto set my hand and affixed [L. S.] seal this eighth day of December, one thousand eight hundred and fifty-nine.

O. J. GREEN, *Clerk.*

Supreme Court, Erie county.

IN THE MATTER OF THE APPLICATION of HENRY B. GIBSON, for an order appointing a Receiver of Oliver Lee and Company's Bank at Buffalo.

SIR: Take notice that Watts Sherman and Alexander Duncan, Watts Sherman, William Butler Duncan, Charles H. Dabney, and David Duncan, composing the firm of Duncan, Sherman & Co., hereby appeal to the court of appeals, from an order made at a general term of this court, in the village of Lockport, in the county of Niagara, on the 16th day of September, 1859, ratifying and confirming the report and apportionment of the referee in this matter and the judgment entered thereon, and also from the judgment

of affirmance entered in this matter in pursuance of said order, in the office of the clerk of Erie county.

Albany, Oct. 26, 1859.

Yours, &c.,
CAGGER & HILL,
Attorneys for Watts Sherman and Alexander Duncan, Watts Sherman, William Butler Duncan, Charles H. Dabney, and David Duncan, composing the firm of Duncan, Sherman & Co.

To JOHN GANSON, Esq., *Attorney, &c.*, and
OBADIAH J. GREENE, *Clerk of Erie county.*

STATE OF NEW YORK, *ss.*

Pleas in the court of appeals, held at the capitol, in the city of Albany, on the thirteenth day of April, in the year of [L. S.] our Lord one thousand eight hundred and sixty, before the judges of said court.

Witness—
GEORGE F. COMSTOCK, Esquire,
Chief Judge.
CHARLES HUGHES,
Clerk.

IN THE MATTER OF THE APPLICATION of HENRY B. GIBSON, for an order appointing a Receiver of Oliver Lee & Company's Bank at Buffalo.

Be it remembered, that on the ninth day of December, in the year of our Lord one thousand eight hundred and fifty-nine, Watts Sherman and Alexander Duncan, and others, the appellants in this action, came here into the court of appeals by Cagger & Hill, their attorneys and counsel, and filed in the said court their notice of appeal and return thereto, from a judgment and order of the supreme court. And James M. Smith, receiver of said bank, the respondent in said action, afterwards appeared in said court of appeals, by John Ganson, his attorney and counsel, which said notice of appeal and return thereto, filed as aforesaid, are hereunto annexed.

Whereupon the said court of appeals, after having heard this action argued by Mr. John K. Porter, counsel for the appellants, and by Mr. John Ganson, counsel for the respondent, and after due deliberation having been had thereon, did order and adjudge that the judgment and order of the supreme court appealed from in this action be in all things affirmed.

And it was further ordered and adjudged that the respondent recover against the appellants costs of appeal in this court, and

also interest on the amount of the judgment of the supreme court by way of damages for the delay and vexation caused by the bringing of the appeal in this action.

It was also ordered that the record and proceedings be remitted to the Supreme Court, there to be proceeded upon according to law.

Therefore it is considered that the said judgment and order be in all things affirmed, with costs as aforesaid, and stand in full force, strength and effect. And hereupon, as well the notice of appeal and return thereto aforesaid, as the judgment of the court of appeals aforesaid, by them given in the premises, are by the said court of appeals remitted into the supreme court of the State of New York, before the justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said supreme court, before the justices thereof, &c.

CHARLES HUGHES, *Clerk.*

COURT OF APPEALS, CLERK'S OFFICE,
Albany, April 26, 1860.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the court of appeals, with the papers originally filed therein attached.

DAVID WILSON, *Dp. Clerk.*

Supreme Court.

IN THE MATTER OF THE APPLICATION of HENRY B. GIBSON, for an order appointing a Receiver of Oliver Lee & Company's Bank at Buffalo.

The appeal to the court of appeals on the part of Watts Sherman, Alexander Duncan, Watts Sherman, William Butler Duncan, Charles H. Dabney, and David Duncan, composing the firm of Duncan, Sherman & Company, from the judgment of the general term of this court confirming the apportionment of the referee in this proceeding, having been argued, and the said court of appeals having, after due deliberation, ordered that the said order and judgment appealed from be in all things affirmed, with costs, and interest on the amount of the judgment by way of damages; and the proceedings of the court of appeals having been remitted to this court to be proceeded on according to law:

Now, on motion of John Ganson, attorney for the respondent, James M. Smith, as receiver of the property of Oliver Lee & Company's Bank at Buffalo aforesaid, it is ordered that the judgment of the court of appeals be made the judgment of this court, and that the said order affirming the apportionment of the referee and the judgment of the general term be, and the same is, hereby rat-

ified and confirmed, and that the respondent recover interest on the said judgment, and also that he recover of the appellant, Watts Sherman, the sum of seventy-six dollars and thirty-two cents of costs; and that the said respondent also recover of Alexander Duncan, Watts Sherman, William Butler Duncan, Charles H. Dabney, and David Duncan (composing the firm of Duncan, Sherman & Company), the sum of ninety-six dollars and fifty-two cents of costs, and that execution issue therefor.

Judgment signed May 14th, 1860.

O. J. GREEN, *Clerk.*

Stipulation waiving Security for Costs on Appeal.

IN THE MATTER OF THE APPLICATION of HENRY B. GIBSON, for an order appointing a Receiver of Oliver Lee and Company's Bank at Buffalo.

I, as attorney of James M. Smith, as receiver in this matter, do hereby stipulate that Messrs. Watts Sherman, and Messrs. Duncan, Sherman & Co., in case they sue out a writ of error in this matter to the Supreme Court of the United States, need not give any security for the costs on such writ, the same being hereby waived.

Dated July 7th, 1860.

JOHN GANSON,
Attorney for James M. Smith, Receiver, &c.

Filed July 11, 1860.

Writ of Error.

[L. S.] UNITED STATES OF AMERICA, *ss.*

The President of the United States of America,

To the Justices of the Supreme Court of the State of New York, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said supreme court of the State of New York, before you, in the matter of the application of Henry B. Gibson for an order appointing a receiver of Oliver Lee and Company's Bank at Buffalo, and Watts Sherman and others, manifest error hath happened, to the great damage of the said Watts Sherman, as appears by his complaint: we, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so

that you have the same at Washington on the 3d day of December next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Honorable Roger B. Taney, Chief Justice of the said Supreme Court of the United States, this 1st Monday of March, in the year of our Lord one thousand eight hundred and sixty, and of the independence of the United States the eighty-fourth.

A. A. BOYCE, *Clerk.*

JOHN K. PORTER,
Att'y for Pl'ff in Error.

July 16th, 1860.—Allowed.

S. NELSON.

Filed July 20, 1860, 12½ p. m.

Citation.

IN THE MATTER OF THE APPLICATION of HENRY B. GIBSON, for an order appointing a Receiver of Oliver Lee and Company's Bank at Buffalo.

UNITED STATES OF AMERICA, *ss.*

To James M. Smith, Receiver of Oliver Lee and Company's Bank at Buffalo:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the 3d day of December next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of New York, to wit, in the office of the clerk of the county of Erie in said State, wherein Watts Sherman is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Sam'l Nelson, one of the Justices of the Supreme Court of the United States, this 16th day of July, in the year of our Lord 1860.

S. NELSON,
One of the Justices of the Supreme Court of the United States.

JOHN K. PORTER,
Att'y for Pl'ff in Error.

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Witness the Honorable Samuel Nelson, one of the justices of the Supreme Court of the United States, this 16th day of July, in the year of our Lord 1860.

S. NELSON,
One of the Justices of the Supreme Court of the United States.

JOHN K. PORTER, *for Pl'ff in Error.*

Personal service of an original citation, of which the within is a copy, is admitted this 20th day of July, 1860.

JOHN GANSON, *Att'y for Def't in Error.*

STATE OF NEW YORK, SUPREME COURT,
Erie County, Clerk's Office, ss.

To the Hon. the Supreme Court of the United States of America:

In obedience to a writ of error and citation to me directed, and which is hereunto attached, I, Obadiah J. Green, clerk of the supreme court of the State of New York, in and for the county of Erie, do hereby certify that the preceding is a correct transcript of the records and proceedings in said action, and now remaining of record and on file in this office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court, at the city of Buffalo, this twen-
[L. S.] ty-eighth day of July, in the year of our Lord one thousand eight hundred and sixty.

JOS. L. FAIRCHILD,
Sp. D'p Clerk.

Filed 28th October, 1860.

Wm. C. Bryant & Co., Printers, 41 Nassau St., cor. Liberty.

In the Supreme Court,

OF THE UNITED STATES.

In the Matter

of

The application of Henry B. Gibson, for an order appointing a Receiver of Oliver Lee & Company's Bank at Buffalo, New York.

Duncan, Sherman & Co.,
Appellants.

In Same Matter.

Watts Sherman,
Appellant.

John K. Porter,
John Van Buren,
William Ware Peck,
Counsel for Appellants.

Points for Appellants.

This is an appeal from the judgment of the ~~Supreme~~ Court of Appeals of the State of New York, affirming an order at ~~Special~~ General Term, charging the shareholders of the bank with personal liabilities equal to the amount of stock held by them respectively.

The proceedings were instituted under the act of 1849, which was framed to regulate *the mode of enforcing* the liabilities imposed respectivoly on the stockholders of certain banking corporations by the constitution of 1846.

The Oliver Lee & Company's Bank at Buffalo was organized before the act in question, and before the revision of the constitution, having commenced business on the 22d of January, 1844, and continued it until its suspension in 1857. (Case, fols. 102, 123.)

The general banking law provides that "no shareholder "of any such association shall be liable in his individual "capacity for any contract, debt, or engagement of such "association, unless the articles of association by him "signed shall have declared that the shareholder shall be "so liable." (Laws of 1839, 250, sec. 23.)

The articles of association between the shareholders provided that "the shareholders of this association shall "not be liable in their individual capacity for any contract, "debt, or engagement of the association." (Case, fol. 112.)

The certificate of organization filed pursuant to the general banking law contained a clause stating that "the "said articles also declare that the shareholders of the as-"sociation shall not be liable in their individual capacity, "for any contract, debt, or engagement of the association." (Case, fol. 120.)

The articles of association, by their terms, could only be changed with the written consent of two-thirds in interest of the shareholders. (Fol. 114.)

It is not denied that the contract between the associates was lawful at the time it was made, and the question now is whether it *could be* constitutionally impaired without the consent of the contracting parties, and if so whether it *has* been so impaired by the act of 1849.

The appellee claims that the act of 1849 legally imposes upon the shareholders of the association liability for its debts through a power reserved in section 32 of the act of 1838.

First.—The proposition conflicts with a principle primary in the law of contracts, and antecedent to Art. 1st, sec. 10, subd'n 1 of the Federal Constitution—that a contract is founded in mutual consent. Had the act of '38 been silent upon the subject, upon the organizing of the association two effects would have followed,—the latter would have come into a full status of liability; the shareholder would have been simply creditor upon a negotiable debt, with a right to payment of principal on dissolution of the bank, and of earnings in the interim, and subject to a preference in the other creditors to the assets; with perfect exemption from the liabilities of the bank. Section "23" is at least declaratory of this exemption. To impose upon him liability for the bank, is to impose a contract having form without essence, and is opposed to the fundamental principles of legislation, and would render the statute an act against "common reason and common right."

The power of alteration reserved in sec. 32 must be referred to the subject matter of the act, the corporation and those provisions which relate to its *modus operandi*.

1 Parsons on Contracts, 399.
21 Barbour, 513, 519, Miller *vs.* N. Y. & Erie R. R. Co.
1 Bay., 93, Ham *vs.* McClairs.
2 Dall., 398, Iredell, J., Opinion of. Calder et Wife v. Bull & Wife.
1 Bald., 74, Baldwin, J. " Bennett v. Boggs.
1 Har. & J., 249, Chase, C. J. " Schuyler et al. v. McCrea.
2 Rawle, 374, Rodgers, J. " Commonwealth v. McCloskey and
1 Sumner 302 and 303, Allen v. McKean.

Second.—The contract between the associates, having been entered into lawfully in 1844, was protected by the federal constitution from encroachment by subsequent legislation.

Constitution U. S., Art. 1, sec. 10, subd. 1.

I. The act of 1838 not only provided for the creation of banking associations, but also secured to the associates who might accept its provisions the right of determining their *status* as shareholders, in respect to the future creditors of the banks organized under it.

1. It invited citizens *to associate* for the purpose of conducting the business of banking.

Laws of 1838, 249, Sec. 15.

2. It invited them to enter into agreement *as between themselves*, by articles of association preceding the organization, defining the terms and conditions on which they consented to become so associated.

3. These *articles of association* were to be the private contract of the several shareholders with each other and the association, as distinguished from the contract with the public, embodied in the *act itself*, and the *certificate of organization*.

4. The matters required to be stated in the certificate of organization was specifically enumerated, and this certificate alone was to be placed upon the public records.

Laws of 1838, 249, sec. 16.

5. All that was not provided for by the act or the certificate, was left to the associates to be regulated by private contract in their articles of association.

Thus the 18th section empowers the association to conduct its business "in the manner specified in the articles."

The 19th section declares the stock transferable in such manner as may be agreed on in the articles.

The same section provides against changing the articles so as to affect the rights, remedies, or security of existing creditors, thus showing that the articles, unlike *the certificate*, might be altered in other respects *at the will of the shareholders.*

The 20th section empowers the associates to provide for a deviation from the certificate, by increasing from time to time the amount of their capital and the number of the associates.

The 23d section leaves to the shareholders the *election* to determine by private contract in their articles of association, whether they will accept the franchise charged with, or absolved from, the burden of personal liability.

6. These matters, no less than the election of officers and the designation of their duties, were "*all left to conventional arrangement among the associates.*"

6 Hill, 371, in matter of Bank of Dansville.

II. The legislature did not *reserve* a right to make a new contract as between the shareholders, nor to impair their rights under the contract it authorized them to make with each other and the association.

1. The right reserved was, to modify or rescind the grant of corporate rights to the *association*—not to enact that its debts should be paid *by those who did not owe them.*

2. The legislature reserved the right to abridge, enlarge, or revoke the corporate franchises it conferred, but not to alter private contracts of the shareholders, by revoking a power *after its execution*, together with the contract executed under it.

16 How. U. S. R., 385, State Bank of Ohio *vs.* Knoop.

3. The right to charge one person, without his consent, with the payment of another's debts, was not in-

herent in the legislature, and it did not *reserve* powers it did not *possess*.

21 Barbour, 513, 519, Miller *v.* N. Y. & Erie R. R. Co.

4. The legislature, it is true, could make it a condition to the creation of a banking association, that the associates should *consent* to assume its debts, and in that case the consent would be evinced by acceptance of the corporate grant.

18 N. York R., 210, Matter of Empire City Bank.

5. But the general banking law invited citizens of the State to form associations under its provisions, *pledging the public faith to each*, that his acceptance of the grant should *not enure as a consent* to be charged with the payment of its debts.

6. The act was a general charter tendered to those who might choose to form banking corporations, and the provisions that "the legislature may at any time alter or repeal *this act*," was not a provision that the legislature might apply the *private property* of the associates, not invested in the corporation, to such uses as the State should see fit.

Laws of 1838, 253, sec. 32.

7. The act in terms *excluded* the implication of any *such* consent, and the private rights of each associate in respect to his property not embarked in the enterprise, were protected from any encroachment in virtue of the fact that he had consented to become a member of the corporation.

8. The clauses are to be read together; and for the purposes of the argument it may be conceded that the contract thus read is, that the legislature may deal at will with the *corporate rights* it grants, and the property which the associate commits to the cus-

tody of the *corporation;* but in respect to all his *other* property and all his *personal* rights they shall remain, unless he otherwise elect, as if he had never become an associate.

9. In other words, each associate consented when he became such, that the legislature might exercise its power over the corporate rights and property, but none, without *his* consent, over his private rights and property, held outside the association, and by a tenure independent of the General Banking Law.

10. The power to change the terms and obligations of antecedent *contracts*, made between the individual associates, is not reserved by the 32d section; and the reservation therein of power at any time to repeal "*this act*," has full scope and effect, without construing it as authorizing the legislature to impair or annul contracts lawfully made between the associates prior to such alteration or repeal.

III. The legislature did not *acquire* a right to impair the contract of 1844, and to charge the individual associates with the debts of the bank, by reason of the association continuing to issue bills after the day designated in the act of 1849. The exemption of the shareholder could not be impared, except, at least, upon the written assent of two-thirds in interest of the shareholders, art. 17, of the Articles of Association, case, fol. 114; the article reserving to him a will over the subject of exemption, and the right of exercise and control of that will in a single and specific way; therefore the corporation proceeding after the 1st of January, '50, as before, could not effect this exemption; *it being no act of the shareholders in the mode prescribed in said article, and the corporation being no party to the articles.*

Angel & Ames in Corporation, sec. 537, 536.
1 N. H. 44, The L. & C. Co. v. Town.
11 Georgia, 438, Winter v. Muscogee R. & Co.
1 Stockton 401, Kean v. Johnson and others.
31 Eng. L. & Eq. ex parte Johnson.
21 Barbour, 519, supra.
4 Johnson Chy. Livingston v. Lynch et als., 573, 582, 595 to 598.
1 Sumner, 314.
Laws of 1849, 340, sec. 3.

1. Such a condition could *properly* be imposed in respect to all *future* associations; for the burden would be voluntarily assumed, each citizen being free to consent or refuse to become a corporator on these terms.

   18 New York R, 210, Matter of Empire City Bank.

2. But the associates whose *status* as a shareholder was fixed in 1844, *never consented* to become surety for the debts of the bank.

3. He became an associate on a pledge of the public faith, that his private property and rights, outside the organization, should remain intact, and beyond the reach alike of the State and the corporation.

4. So much as he had invested, he had consented to commit to the control of the association and the Legislature, but beyond this, he had refused to surrender to either the control of his private fortune or his personal rights.

5. It is mockery to say that *he consented* by issuing bills after the act of 1849. *He* neither issued bills, nor consented to issue them; and the act left him as it found him, passive and powerless, subject to the will of the Legislature and the corporation, and utterly impotent to control the action of either.

6. If it be said that it was his folly to have become a corporator, the answer is that he would not have become so, but for the pledge of the public faith that his private property and rights should be untouched unless by *his own* consent.

7. If it be said that he ought to have sold his stock, the answer is that he owed no such *duty* to the State; and that he was *disabled* from selling by the burden with which the stock was encumbered by the act.

8. If it be claimed that the *corporation* consented to charge him with his debts, the answer is that he never delegated to it any such power; and that he consented to become a corporator only on the condition, declared by law, and secured by contract, that his private rights should be beyond its control, as its corporate rights would be beyond his own.

9. The Constitution of 1846, and the Act of 1849, *so* far as they apply to *future* corporations, leave it to the *free will* of every citizen whether he will assume debts not his own, but in respect to *preexisting* corporations, if they apply to these, they leave it to the election, not of the *associate* who is to be charged with another's debt, but of the *corporation* with whose debts he is to be charged.

10. The associate's liability is made dependent on no act of *his own* but on *the will of the corporation*, of which he became a member, only on the guaranty that in respect to his *private* rights and property, its will and consent should not be substituted for his own.

11. The State found two parties in existence, the associate and the corporation, each independent, and capable of suing or being sued by the other, each invested with distinct and peculiar rights secured by contract and by law, those of the associate *fixed*, those of the corporation *revocable*, and the associate whose rights are invaded is told that if *he* has not consented, the *other* two parties to the contract have.

12. The statute of 1849 does not alter or revoke the grant of corporate power, but leaves it to the *corporation*, in defiance of its own contract and that of the State, to decide at its pleasure whether the associates shall pay its debts.

IV. The contract of the State with the associates, and their executed contract with each other and the association, on the faith of which they became members of the company, could not be altered or impaired by the State without the consent of the associates.

3 Howard's U. S. R., 133, 147, '8, Gordon *vs.* Appeals Tax Court.

Angell & Ames on Corporations, sec. 537.

5 Hill, 383, 386, Hartford R. P. Co. *vs.* Crosswell.

8 Wheaton, 2, 92, Green *vs.* Biddle.

18 Howard's U. S. R., 331, 359, Dodge *vs.* Woolsey.

16 do., 369, Piqua B'k v. Knoop.

1 Sumner, 278, 313, 314, Allen v. McKean.

4 Johnson Chy., Livingston v. Lynch and others, 573, 582, 595, to 598.

21 Howard, 442, R. v. M. & I. R. R. Co., and P. & I. R. R. Co.

Third.—The act of 1849 derives no aid in respect to pre-existing banks from the personal liability clause in the present Constitution.

Constitution of 1846, Art. 8, Sec. 6.

1. The judgment in this case rests for its support on the *summary proceedings* instituted under the act of 1849.

2. There is no pretence that the *constitutional provision* could impair the rights of the associates under their previous contract; as the power of alteration and repeal was reserved, not to the *State* or the *People*, but in express terms to the *Legislature*.

3. Besides, the Constitution itself declares that nothing

therein contained shall annul any charters to bodies politic or corporate made by the King before 1775, nor "*affect any such grants or charters since made by this State, or by persons acting under its authority*" (Const. of 1846, Art. 1, Sec. 18); and in terms limits Sec. 7, Art. 8 (1st Rev. Sta., 4th ed., page 65) to operation upon future banking associations.

4. The federal constitution protects contracts from encroachment by the *State Constitution*, no less than by acts of the *Legislature*. "No *State*" shall pass "*any law* impairing the obligation of contracts."

18 Howard's U. S. R., 331 Dodge *vs.* Woolsey.

6 McLean, 145–6. Same case.

Fourth.—The Legislature did not intend by sec. 32 to reserve power over the status of the shareholders.

1. In grants, private and public, general words are controlled by special words, when the two are employed upon the same subject matter, and would otherwise conflict. Sec. 19 provides, that the rights of the creditors shall not be impaired; and sec. 23 declares, that the shareholder shall not be liable for the debts, unless by consent specified in the articles of association. The explicitness of the terms requires a literal construction, and are in direct conflict with sec. 32, if the term "alter" relates to the status of the shareholder; and sec. 32 must yield even if it be treated as superfluous for want of other application, but it has other application, and sec. 32 must read as if containing an exception as to "alter" of secs. 19 and 23. This is especially so, when the general words reserve to the State a power dangerous to the rights of the citizens.

2 Scam. 223, Mason *vs.* Finch.

1 Pike, 410, McFarland *vs.* State Bank.

2 Strobh., 474, State *vs.* Williams.

12 Ill., 339, Town Ottawa *vs.* County La Salle.

2 Roll. Abr., 409.

4 M. & S., 426, Taylor *vs.* Homersham.

2 Parsons on Contract, page 13, N. r, and cases there cited.

9 Mass., 235, Lyman *vs.* Clark.

16 Johnson, Jackson ex dem., Stevens *vs* Stevens, 110.

Dwarris on Statutes pp. 572-13-14-24-36-40-41 and citations

18 B. Monroe, 262, Covington *vs.* McNickle.
1 Cowan, 122, Jackson *vs.* Stackhouse.
18 Georgia, 526, Torrence *vs.* McDougald.
7 Ba[illegible]. and Cress., 643, Bu. and Brandling.
2 Tem., 701; Townley *vs.* Gibson.
1 Coke, 68, Alton Woods.
Plowden, 365, Duke Norfolk's case.
5 Greenleaf's Crim. 19, Sec. 44.
5 " " tit., Private acts and King's Grants, pp. 1—53.
4 Greenleaf's Crim, 174, Sec. 26,—300, Sec. 8,–303, Sec. 15,–345, Sec. 62, note 1.

II. The exercise of the power of alteration, as claimed by the appellee, involves first a repeal of sections 19 and 23, Secondly, the substitution of the act of '49. The repealing clause in a charter is never construed literally, as that would divest rights pre-acquired under the charter. The rule is intended to guard rights so acquired from encroachment under the repealing power. The rule does not arise from indulgence, but is necessitated by the nature of the grant, otherwise no grant would be accepted. In this statute the repealing clause should be taken, as a matter of course, to apply in *futuro*—for example, to shorten the term of the corporation, or to limit it as to one or more particulars as to such business.

21 Barb., 513, Supra.
2 South., 689, Dwight *vs.* Robinson.
Breese, Rep. App., 29, Naught *vs.* O'Neal.
2 Har. & J., 40, McMechon *vs.* The Mayor.
2 Stew., 160, Taylor *vs.* Rushing.
1 Harr., 285, James *vs.* Dubois.
1 How. Miss., 183, Davis *vs.* Minor.
4 Burr., 24, 60, Infra.
1 Harr., 285, James *vs.* Dubois.
1 How. Mo. Reps., 183, Davis *vs.* Minor.
1 Green's R., 327, Noble *vs.* State.
1 Tem., 721, Ward and Cecil.
Amb., 697, Westby and Kinnan.
3 Wills' R., 483, Prov. Eaton *vs.* Ep. Winton.
4 Gwill, 1387, Riddle *vs.* White.
Hobard, 168, Stukeley *vs.* Butler.
1 Kent's Com., 512.

1 Branch, 356, Mitchell *v.* Doggett.
17 Verm., 479, Henry *v.* Tilson.
9 Miss., 507, City of St. Louis *v.* Russel.
6. Cran. 89. Fletcher v. Peck

III. The act of 1849 having been framed by the Legislature, as declared in its title, and apparent from its whole tenor, for the specific purpose of enforcing the personal liability clause in the Constitution of 1846, could not be extended by construction to the cases of *pre-existing banks* to which that clause can not be properly applied. This follows from the rule, that in the construction of a statute other laws in *pari materiâ* must be taken in connection with it.

Fifth.—If the Legislature had *power* to change the terms and impair the obligation of contracts executed between shareholders under the law of 1838, and prior to the Constitution of 1846, every intendment is against a construction of the act of 1849, which would make it operate upon such antecedent contracts.

I. As to members of corporations formed *after its adoption*, the law is equitable and just; for every associate has expressly assented to its provisions by becoming a member of the corporation on the conditions it prescribes.

18 N. York R., 210.

II. The law, though summary and severe in its mode of procedure, might perhaps be applied, without great injustice, to the members of banking associations organized after the new constitution; for they became such with full notice at least of the personal liability clause.

III. But as to associates who previously became such, under inducements held out by the State that they should not be charged with personal liability, every reason is against a construction which would subject each member of the corporation to suretyship for its debts, unless a body over which he has no control should choose to surrender its corporate franchises.

IV. Where a law is reasonable and just in its application to a class of cases which might well satisfy its terms, and was in the probable contemplation of the legislature, general words will be restrained to prevent its application to cases where its operation would be harsh and unjust.

V. This rule applies with peculiar force where the words of the statute, unless restrained, will operate retrospectively on antecedent rights.

2 Hill, 238, Johnson *vs.* Burrill.
11 Paige, 400, Wood *vs.* Oakley.

7 Johnson, 417, Dash *vs.* Van Kleek.
3 Selden, 385, People *vs.* Clark.
2 Mod., Gilmore *vs.* Shuter.
4 Burr., 2460, Couch *vs.* Jeffries.
8 Wendel, 661, Sayer and Wife *vs.* Wisner.
1 Harr, 285, *Supra.*
1 Branch, 356, do.
10 S. & M., 599, Hooker *vs.* Hooker.
4 Gilm., 221, Bruce *vs.* Schuyler.
1 Blatch. Ct. Ct., 608, Morlot *vs.* Lawrence.
Crabbe, 356, United States *vs.* Cases Cloths.
4 Pike, 410, *Supra.*
12 Ill., 339, town Ottawa *vs.* county La Salle.
21 Penn., Brown *vs.* County Comm's.
5 Hill, 527, Sackett *vs.* Andross. Elaborate opinion of Brown, J.
1 Denin, 128, Quackenbush *vs.* Danks.
29 Penn., 113, Dewart *vs.* Purdy.
1 Hemp., 469, U. S. *vs.* Stane.
7 Ind., 50, Aurora and L. T. Co. *vs.* Holdhow.
4 Mich., 322, Brown *vs.* Fifield.
3 Scam., 153, People *vs.* C. Comm's.
19 Ala., 707, Barnes *vs.* Mayor Mobile.
4 Gilm., 221, Bruce *vs.* Schuyler.
5 Hill, 221, Brown and others *vs.* Lever, Sheriff, &c.

VI. This should be especially so, where, as in this case, the law, if applicable to members of pre-existing associations, imposes personal liability on the shareholder, as a *penalty* upon him for the neglect of the *corporation* to make a voluntary surrender of its franchises.

VII. The provisions of the act have full scope and effect, by applying them to corporations organized subsequent to its adoption, or, at all events, to associations formed under the new constitution.

26 Barb., 657, 660, Rochester *vs.* Barnes.

1. The act should not be construed as extending to corporations *other* than those reached by the personal liability clause in the Constitution, which it purports to have been framed to enforce.

2. That clearly extended only to subsequent corporations, as the State had reserved no right to alter previous contracts otherwise than by act of the *Legislature*.

3. The *eighth article* of the constitution upon its face evidently contemplates corporations to be created *thereafter* pursuant to its provisions.

4. The title of the act evinces the design of the Legislature not to apply its provisions to all banking corporations. It is as follows:

> "An act to enforce the responsibility of stock-
> "holders in CERTAIN banking corporations and asso-
> "ciations, as prescribed by *the constitution*, and to
> "provide for the prompt pay of demands against
> "SUCH corporations and associations."
>
> Laws of 1849, 349.

VIII. The mode of proceeding prescribed by the act, though it furnishes no cause of complaint to those who have *assented to it* by subsequently becoming corporators, would be exceedingly oppressive and unjust if applied to those who became associates on the faith of contracts and laws absolving them from personal liability.

1. It provides that the liability of the stockholders shall be enforced only in the mode it prescribes; thus restricting the shareholders and the creditors alike to its anomalous and summary process of ascertaining and determining their respective rights.

   Laws of 1849, 340, sec. 1.

2. The process to which the parties are thus limited is special and peculiar, and the rights of the stockholders, as well as of the corporation and its creditors, are to be decided and divested under its provisions, without the right of trial by jury, or personal service of process.

3. It prevents even the *corporation* from contesting the claim of the creditor who institutes the process, unless by permission of a Judge out of Court, to be obtained on affidavit showing what the defence is; and the Judge may withhold the right of defending, unless *he is satisfied* the defence is a good one.

Sections 16, &c.

4. The claims of creditors are to be ascertained extra judicially by the Receiver, and the shareholders not only have no opportunity to contest them, but they are not even by constructive notice made parties to the proceedings, until the Receiver has exhausted the assets by declaring dividends on such uncontested claims.

Sections 11 to 15.

5. The stockholders have no opportunity of contesting their *status as such*, or the *apportionment* of the debts and liabilities *in any suit* between them and the creditors, and are deprived of the right of trial by jury in respect to any question on which their liability depends.

6. These summary judgments are to be rendered against the shareholders, with no day in Court, unless within the *three weeks* prescribed for publication they chance to meet with the constructive newspaper notice, which could be of no possible avail to a foreign stockholder or the resident of a distant State.

JOHN K. PORTER,
JOHN VAN BUREN,
WILLIAM WARE PECK,
Counsel for Appellants.

Burney's book
D Campbell

IN THE

SUPREME COURT

OF THE

UNITED STATES.

JAMES M. SMITH, Receiver of OLIVER LEE & COMPANY'S BANK AT BUFFALO,
Defendant in Error.
ads.
WATTS SHERMAN,
Plaintiff in Error.

No. 133.

Points on the part of the Defendant in Error.

JOHN GANSON,
For Defendant in Error.

The plaintiff in error, Mr. Watts Sherman, was assessed, as a stockholder of Oliver Lee & Company's Bank at Buffalo, in this proceeding which was instituted in the Supreme Court of the State of New York for the purpose of assessing all of the stockholders of that Bank, under the provisions of an act passed by the Legislature of that State, on the 5th of April, 1849.

The first section of that act is in these words:

"Whenever default shall be made in the payment of any "debt, or liability, contracted after the first day of January, "one thousand eight hundred and fifty, by any corpora-

"tion, or joint stock association, for banking purposes, "*issuing bank notes*, or any kind of paper credits to circu- "late as money, after the first day of January, one thou- "sand eight hundred and fifty, the stockholders of such "corporation, or association, shall be individually respon- "sible, equally and rateably, such responsibility to be "enforced as hereafter provided, and in no other manner, "for the amount of such debt, or liability, with interest, "to the extent of their respective shares of stock in any "such corporation, or association, as hereinafter provided."

This act was passed, as its title declares, "to enforce "the responsibility of stockholders in certain banking "corporations and associations as prescribed by the Con- "stitution and to provide for the prompt payment of "demands against such corporations and associations." (The Session Laws of New York for 1849, Chapter 226, p. 340, sec. 1.)

The seventh section of the eighth article of the Constitution of the State of New York, which was adopted on the third day of November, 1846, declares that "the stock- "holders in every corporation and joint stock association "for banking purposes, issuing bank notes, or any kind of "paper credits to circulate as money, after the first day "of January, one thousand eight hundred and fifty, shall "be individually responsible to the amount of their respec- "tive share or shares of stock in any such corporation, or "association, for all its debts and liabilities of every kind, "contracted after the first day of January, one thousand "eight hundred and fifty" (Constitution of New York, adopted November 3, 1846, article 8, section 7.)

Oliver Lee & Company's Bank at Buffalo was an association organized on the twenty-third day of January, one thousand eight hundred and forty-four, for the purpose of banking, under and in pursuance of an act of the Legislature of the State of New York, entitled "An act to authorize the business of banking," passed on the eighteenth

day of April, one thousand eight hundred and thirty-eight." (Session Laws of 1838, p. 245.)

This act provides that "any number of persons may "associate to establish offices of discount, deposite and "circulation upon the terms and conditions and subject to "the liabilities prescribed in act." (Session Laws of 1838, p. 249, sec. 15.)

The organization of an association under that act is made by articles to be signed and filed by the associates, specifying the name assumed by the associates in the transaction of their business, the place where its operations are to be carried on, the amount of the capital stock and the number of shares, the names and places of the residence of the shareholders, and the number held by each shareholder, and the period at which the association shall commence and terminate. (Section 16 of act of 1838, p. 249.)

The twenty-third section of the act of 1838 provides that "no shareholder of any such association shall be "liable in his individual capacity for any contract, debt, "or engagement of such association, unless the articles "of association by him signed shall have declared that "the shareholder shall be so liable." (Session Laws of 1838, page 250, section 23.)

The plaintiff in error, in this case, signed the articles of association, and was therein stated to be a shareholder to the extent of $30,000. The fourteenth clause of those articles declared that "the shareholders of the association "should not be liable in their individual capacity for any "contract, debt, or engagement of the association." (Error Book page 17, article 14.)

The act under which this association was formed declared that the "legislature might at any time alter, or repeal the act." (Session Laws of 1838, page 253, section 32.)

Oliver Lee and Company's Bank at Buffalo became insolvent, and suspended business by reason thereof, on the

4th day of September, 1857. Proceedings were instituted, under the act of 1849, to assess the stockholders so as to pay the debts and discharge the liabilities of the bank. The plaintiff in error, in such proceeding, was assessed an amount equal to his stock. The highest tribunals of the State of New York, to which the plaintiff in error appealed, has affirmed the proceeding and determined it to be regular and binding upon the plaintiff in error.

The plaintiff in error claims, among other things, that the imposition of a personal liability upon him, as a shareholder in this bank, by the State of New York either by a constitutional provision adopted, or legislative enactment passed, subsequent to his becoming a stockholder impairs the obligation of a contract within the meaning of the Federal constitution.

The opinion of the Court of Appeals of the State of New York delivered in this matter will be found in the 21st of New York Reports at page 9.

POINTS.

FIRST. The provisions of the Constitution of the State of New York adopted on the third of November, one thousand eight hundred and forty-six, and the act of the Legisture of that State, passed on the fifth of April, one thousand eight hundred and forty-nine, were intended to apply to all such corporations and associations created or organized for banking purposes prior to the time of the adoption of that constitution, as should elect to issue bank notes or any kind of paper credits to circulate as money, after the first day of January, one thousand eight hundred and fifty.

The constitution and act referred to have been, by the courts of the State of New York, construed to be thus applicable.

21 New York R., page 9.
22 New York Reports, page 9.

SECOND. The constitution of 1846 and the act of 1849 leave it to the *election* of the shareholders of each banking corporation or association whether they will become personally liable for its debts after the first day of January, 1850; for such liability is imposed only upon the shareholders of such corporations or associations, as "issue bank notes or any kind of paper credits to circulate as money, after the first day of January, 1850."

The association, in question, elected to continue to issue bank notes after the day designated, and, therefore, its shareholders *voluntarily* assumed the personal liability imposed by the constitution of 1846 and the act of 1849.

Error Book p. 1, 3, 5, 20.

If the shareholders had yielded that part of the franchise which empowered them to issue bank notes or any kind of paper credits to circulate as money, after the first day of January, 1850, but retained the rest of the franchise they would not have assumed the liability in question.

THIRD. The Revised Statutes of the State of New York and the act of 1838, under which the association in question was organized, expressly reserve to the Legislature the right at any time to alter, or repeal that act, and such alteration, or repeal can be constitutionally made whether it be beneficial, or injurious to the shareholders.

Sec. 32, Session Laws of 1838, p. 253.

1 Rev. Stat. of New York, p. 600, sec. 8.

1 Kernan, 102, 108, 114, Schenectady and Saratoga Plank Road Co. vs. Thatcher.

4 Kernan, 336, 348, 354, Buffalo & New York City R. R. Co. vs. Dudley.

1. It is a part of the *contract* of the shareholder, when he becomes such, that the Legislature may alter, or repeal, the charter of the company, in its discretion, and it does not lie in his mouth to complain that the power has been exercised in accordance with his contract.

1 Kernan, 114, Schenectady & Saratoga R. R. Co. v. Thatcher.

2. This reservation has been construed by the courts of New York to apply to contracts made between the individual shareholder and the corporation, or association.

10 Barb., 260, 280, The Northern R. R. Co. v. Miller.

14 Barb., 559, 566, White v. The Syracuse & Utica R. R. Co.

4 Kernan, 336, 348, 354, Buffalo & New York City R. R. Co. v. Dudley.

FOURTH. There is not any contract in the articles of association of Oliver Lee & Company's Bank at Buffalo, authorized by the act of 1838 to be inserted in the articles of association, which is beyond the repealing, or amendatory power reserved by the Legislature.

The provision contained in the fourteenth clause of the articles of association, to the effect that the shareholders should not be liable individually for the debts or liabilities of the Bank, was not authorized by the 23d section of the act of 1838.

That section declares that the associates shall not be thus liable unless they, in their articles contract to be liable, but the *exemption* from liability was not left by the act to be secured by the articles.

FIFTH. The plaintiff in error must establish, in order to maintain their position, not only that the State has entered into a contract with the associates not to impose any personal liability on them for any portion of the debts, or liabilities of the association, but also that the Legislature has not reserved to itself the power to change such contract.

3 Shepley, 191, Stanley vs. Stanley. 26 Maine
11 Peters, 549, Charles River Bridge vs. Warren Bridge.
16 How. (U. S.) 416, 436, Ohio Life Insurance and Trust Co. vs. Debolt.
3 Wend. 588, 609, Bank of Columbia vs. The Attorney General.

In the cases of The Piqua Bank, of the State Bank of Ohio v. Knoop, (16 How. 369,) and of Dodge v. Woolsey, (18 How. 331,) there was an express contract in the law, under which the bank was organized, that the sum set off, under the provisions of the act, should be in lieu of all taxes to which the company, or the stockholders therein, would otherwise be subject, (16 How. 577, 18 How. 359.) There was not any power reserved in the law to alter or modify it provisions. The legislature subsequently imposed an additional tax, which was held to impair the obligation of the contract contained in the original act.

The Court put the unconstitutionality of the subsequent act upon the ground that there was not any power reserved in the original act, by the legislature to make this change. (16 How. p. 380.)

SUPREME COURT OF THE UNITED STATES.

No. 132.—December Term, 1861.

Andrew Hodges' Administrator et al., Appellants, vs. Leslie Combs.	Appeal from Circuit Court United States for the District of Columbia.

Brief of Reverdy Johnson *for Appellants.*

This case is the same as it was when before this court on the appeal of the present appellee, (reported 21 Howard, 397,), except that the power of attorney from him, the appellee, to James Love, is now proved.

It was executed by Combs the 13th February, 1840, and is in transcript, page 38.

It will be contended, that this fact takes the case out of the operation of the principles of the decision of this court on the former appeal.

The power of attorney was a general one, and gave to the attorney all the control over the certificates in question that Combs would himself have had. As he could have disposed of them, so could his attorney.

No cases are cited to maintain this proposition, as it is elementary.

REVERDY JOHNSON,
For Appellants.

IN THE

Supreme Court of the United States.

JOHN L. HODGE, administrator of Andrew Hodge, dec'd, WILLIAM L. HODGE, and JAMES LOVE *vs.* LESLIE COMBS.	No. 132. December Term. 1861.

This cause was before this Court at December Term, 1858, and will be found reported in 21 Howard, 397.

It was remanded for further proceedings in conformity with the opinion then delivered. In obedience to that direction, the evidence then in the cause from the Louisiana Court, was rejected by the Circuit Court.

Each party has now filed as evidence copies of certain papers on file in the comptroller's office of Texas. They consist of an extract of a letter written by Leslie Combs to James Love, on 30th October, 1839, authorizing him to draw his (Combs') interest, and invest it in stock, until they commence paying good money for their dividends, and a memorandum of the Secretary of the Treasury of Texas, that "the stock commissioner will regard it as a sufficient power of attorney."

A paper dated 12th February, 1840, under seal, executed by Leslie Combs, by which he constitutes and appoints James Love, of Texas, his general and special agent to transact all manner of business in which he may be interested there, and satisfying and confirming the acts of his agent as fully as if done by himself.

A substitution by James Love to Dr. Anson Jones as attorney for and in behalf of Leslie Combs (and others) to

draw all interest due them on stock founded and standing in their names, dated 21st October, 1840.

And a memorandum made by Leslie Combs, and sworn to by him at Austin, Texas, on the 9th January, 1853, describing the bonds held by him, and stating as follows: "My bonds, not in my posssession, but never transferred by me, nor authorized to be transferred by me to any one, and still my property are. as I believe, No. 5,219 for $5,000, and numbers 5,225, 5,226, and 5,230, one for $1,000, and the other two for $100 each. The books of the Treasury department at Austin will show. Two of these, for $100 each, are in the hands of Col. James Love, of Galveston, and he has promised to send them to me; and two of them have been disposed of by him for his own use, and not mine; one for $5,000, and one for $1,000, and which he has been repeatedly promising for the last twelve years to get back and restore to me, but he has not done so. The whole amount due to me by the late republic of Texas being $69,200, besides interest. All these bonds were issued to me in my own name, and could only be legally transferred, *as appears on their face*, by myself, or my regularly constituted attorney, in fact, on the books of the Treasury at the seat of Government of Texas."

And a certificate properly authenticated that the said statement is a true copy of the original on file in the office of the comptroller at Austin, and that no portion of the $69,200 of the consolidated fund mentioned has been transferred as by law required. This is dated the 13th December, 1859.

These papers will be found on pages 37, 38, and 39 of the record.

The decision of this Court, in 21 Howard, is understood to have settled that the right of property in the certificates mentioned in the bill was originally in Love, that he did not direct their sale or transfer, and they were not disposed of on his account.

And the case was remanded with directions to allow

the parties to amend their pleadings and take testimony, if they should be so advised. It is further understood that the amendments to be allowed were for the purpose of enabling the parties to show the consideration given for these certificates, and the time, place, and circumstances of the contract between Love and the deceased, Andrew Hodge, and also, if there was a power of attorney from Combs to Love, containing an authority to sell, that they might show there was no collusion between Hodge and Love.

It will be seen that nothing has been done by the appellants to satisfy these requirements of the Court, except the production of the power from Combs to Love, in 1840.

The appellee will maintain, if necessary, that that instrument was wholly insufficient to satisfy the requirement of the law of Texas, and of the certificates themselves, and to authorize their sale and transfer.

And second, if it were in every respect amply sufficient for that purpose, yet the failure of the appellant to satisfy the other particulars stated in the opinion of the Court is conclusive against them, and there is no error in the decree of the Circuit Court.

1. The certificates, according to their very terms, could be transferred by Leslie Combs, his legal attorney or representative, on the books of the stock commissioner only.

The case of Maynard vs. Shaw, 5 Tex. R., 334, settles the construction of the law of Texas authorizing the issue and transfer of the certificate, and that the agency of the payee is requisite to the transfer.

An authority, such as that given by Combs to Love, is not an agency of Combs, such as that law contemplated.

Such a construction would authorize Love to dispose of all the property of Combs in Texas, or to make any contract relating to any business or interest which Combs might have in that State.

It would as well authorize him to apply in Combs' name for a divorce, if he had had a wife living in Texas. as to transfer this stock.